IN THE

# SUPREME COURT

OF THE

## State of Washington

TWISP MINING & SMELTING COMPANY, a corporation,

*Petitioner,*

vs.

CHELAN MINING COMPANY, a corporation; SEATTLE-FIRST NATIONAL BANK, acting through its Spokane & Eastern Branch, as Receiver of the Alder Group Mining & Smelting Company, a defunct corporation, and METHOW GOLD MINING CORPORATION, a corporation,

*Respondents.*

No. 28798

**Petitioner's Petition for Rehearing en Banc of Its Petition for Leave to Present to the Superior Court, Its Petition for a New Trial, or in Alternate, a Petition to Reopen Case for Additional Evidence.**

JOSEPH F. MORTON,
*Attorney for Petitioner.*
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**Petitioner's Petition for Rehearing en Banc of Its Petition for Leave to Present to the Superior Court, Its Petition for a New Trial, or in Alternate, a Petition to Reopen Case for Additional Evidence.**

Comes now Petitioner, Twisp Mining & Smelting Company, and respectfully petitions the

above entitled court for a rehearing of its petition for leave to present to the Superior Court of Okanogan County, State of Washington, its motion for a new trial of this cause or in the alternate for leave to present to the Superior Court of Okanogan County, State of Washington, its motion to re-open the case for additional evidence and for a rehearing en banc before the entire Supreme Court on the grounds and for the following reasons:

1. The present "Petition" is an "Original Petition" that is filed in this Supreme Court for leave of this Supreme Court to apply to the Superior Court of Okanogan County. State of Washington, for relief which this Court in *Haaga v. Saginaw Logging Co.*, 170 Wash. 93, 15 P(2d) 655, and *White v. Donini*, 173 Wash. 34, 21 P(2d) 265, holds that this Court has original jurisdiction to grant and Article IV, Section 2 of the Constitution of the State of Washington, provides:

> "* * * In the determination of causes, all decisions of the court (Supreme Court), shall be given in writing, and the grounds of the decision shall be stated. * * *"

In this instant case, the Petitioner by formal Motion requested additional time to present this matter on oral argument. However, the Judge who wrote the opinion, acting as the Chief Justice, denied that request, and on July 21, 1944, also acted as the Chief Justice and only allowed Counsel for Petitioner fifteen minutes to present the Petitioner's case, which was wholly inadequate for said Counsel to present the Petitioner's case and the Department which heard this matter committed error in filing no written opinion, but simply denying the "Petition" without further comment contrary, as Counsel believes, to the provision of Article IV, Section 2 of the State Constitution.

Since the Judgment of the Superior Court of Okanogan County, State of Washington, was appealed to this Court and this Court affirmed the judgment of the lower court and this Court granted the Petitioner an appeal to the Supreme Court of the United States and the mandate of Supreme Court of the United States having been filed in the Clerk's Office of this Supreme Court on January 24, 1944, this Petition which was filed with the Clerk of this Court on June 23, 1944, was

timely filed within the period prescribed by Section 467 of Remington's Revised Statutes, as held by this Court in *In re Shilshole Avenue*, 101 Wash. 135, 141, 172 P. 338.

2. The record shows, as stated by the Trial Judge (St. 357):

> "At the close of the trial the attorneys for all the defendants announced in open court that they did not seek to have the court adjudicate their rights affirmatively. They stated they were only interested in defeating the claim of the plaintiff and that they did not want their respective rights adjudicated amongst themselves. They all declared that they could settle their respective rights themselves without any interference of the court. This being the situation I presume all the court should do is to enter a decree that plaintiff has not shown itself entitle to recover anything against the defendants and that therefore its action will be dismissed as to the defendants, and in view of that outcome the defendants are dismissing any right to affirmative relief on their part."

And this Court had no jurisdiction and committed a reversible error when it considered and acted upon the defendant's purported affirmative defenses after these defendants dismissed any

right to affirmative relief on their part under the authority of *Seeley v. Gilbert*, 16 Wash. (2d) 611, 134 P(2d) 710, and the respondents practiced fraud upon this Supreme Court when they, after dismissing any right to affirmative relief in the lower court, insisted upon their so-called affirmative defenses on the appeal to this Court.

3. Petitioner, the Twisp Mining & Smelting Company, charges that the judgment of the Superior Court of Okanogan County, State of Washington, and the affirmance of same by this Supreme Court has deprived this Petitioner of its property and property right without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States. The grounds of its charge are, in substance, that the sole basis of the "Judgment of the Superior Court of Okanogan County, State of Washington, and the affirmance of same by this Supreme Court was perjured testimony, which was knowingly used by the defendants on the trial in the Superior Court of Okanogan County, State of Washington, and adopted by the Department of this Court that rendered the opinion of this Court on January 18, 1943, as

reported in *Twisp Mining & Smelting Company, Appellant, v. Chelan Mining Company et al., Respondents,* 16 Wash. (2d) 264, 133 P(2d) 300, in order to obtain said judgment and affirmance thereof, and also that the said defendants in the Superior Court of Okanogan County, State of Washington, and in this Court deliberately suppressed evidence which would have impeached and refuted the testimony thus given against the Twisp Mining & Smelting Company.

> 4. The Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities declared and protected when such action is properly invoked. Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of the United States Supreme Court to inquire whether the decision of the State Courts rest upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus denied. *Lawrence v. Tax Commission,* 286 U. S. 276, 282, 76 L. Ed. 1102, 1106.

5. The record in this cause, as held by the Trial Judge, shows the basis upon which the Petitioner's action was founded in the Trial Court, to-wit:

*7*

"It is plain from the allegations of the complaint * * * that the plaintiff is seeking to stand squarely on the proposition that the actions of the trustees of the plaintiff in January, 1934, were wholly without authority and therefore did not bind the plaintiff corporation, and that the illegal character of the performance was known to the officers and agents and managing officers of the Chelan Mining Company—in fact the plaintiff alleges that the agents and managing officers of the Chelan Mining Company participated in, and were accessories in those unlawful and illegal proceedings carried on in January, 1934, when ostensibly the properties of the plaintiff were conveyed to the defendant Chelan Mining Company. * * * This being the situation I must look upon the complaint as being a single purpose effort to set up the invalidity in the conveyance on the sole grounds that it was consummated without authority and was not binding on the Twisp Mining & Smelting Company, the plaintiff herein, and that all the allegations in the complaint to the effect that the officers and agents of the Chelan Mining Company aided, abetted, cajoled and induced the officers and agents of the plaintiff in the illegal perpetrations, are to be considered merely for the purpose of showing that the Chelan Mining Company has notice all along of the invalidity and unholy character of the color of the title which it acquired." (St. 341, 342 —Petition herein p. 13)

6. The Record in this cause shows, that Robert H. Strong, the President of the Chelan Mining Company, testified that he signed the instrument marked for identification as Exhibit No. 24, of date of November 17, 1933, and that his associates in the promotion enterprise of the Chelan Mining Company, also signed that instrument (St. 140). He further testified that he had authority from his associates to enter into negotiations with the Twisp Mining & Smelting Company leading up to the culmination of the purported special meeting of the Board of Trustees of the Twisp Company of date of January 30, 1934, and that Mr. McDowell and Mr. Robinson, two of his associates in the agreement of November 17, 1933, were two of the directors of the Chelan Mining Company, who with himself, held the organization meeting of the Chelan Mining & Smelting Company on January 29, 1934 (St. 150).

He further testified, that he and his associates in the agreement of November 17, 1933, Mr. McDowell, Mr. Robinson and Mrs. Julian, signed Exhibit No. 26, of date of December 12, 1933,

which was introduced in evidence (St. 157), and read from said instrument, as follows:

> "In the memorandum which the four of us enter under date of November 17, 1933, it was set out in paragraph 2 that we were to obtain a new contract satisfactory to the four of us, from the Twisp Company." And then I go on and say: "If agreeable to you I think it would be wise to mutually agree that I am at liberty to enter into any arrangement with the Twisp Co., either in the form of a contract or by transfer of stock, between a new company and the Twisp Company, or in any other manner enter an agreement with these people, if the same is done in the interest of all four of us and otherwise in accordance with the spirit of the contract." (Meaning the contract of November 17, 1933) "That is my letter. I didn't read it completely." (St. 150, 151)

The part of the letter omitted by Mr. Strong read as follows:

> "As things are developing now it is probable that we will not ask for any contract from the Twisp Co., but rather a transfer of the property to a new corporation that will be formed."

He further testified:

> "These men that signed this agreement (Ex. No. 26) left all the details to me. That is the meaning of this agreement and those negotiations were ratified and approved at the time of the incorporation of the company contained in the letter and set forth in the minutes that has already been identified and offered in evidence."

The above testimony is shown in the record (St. 152) and the minutes referred to is shown in the record (St. 85 to 97).

And James O. Cull testified: "Mr. Strong was going to organize a Washington corporation, and would want a representative trustee in Washington" (St. 32). He further testified:

> "I knew at all times, on January 29, and on January 30, when the last Twisp meeting was held, and on the 17th, when the first Twisp meeting was held, that I was to be a local director in Washington of the Chelan Mining Company. *That had been understood and arranged that I was to act as a director of the Chelan.*" (St. 35) (Italics ours)

And for the convenience of this Court to save repetition Petitioner will quote from 19 C. J. S.

477, Section 1006, the law governing James O. Cull acts in the purported transfer of all of the assets of the Twisp Mining & Smelting Company to the Chelan Mining Company:

> "A corporate officer or agent, however, cannot without the corporation's knowledge and consent, represent it in a transaction with another corporation which has opposing interests, and in which he is interested as director or other officers."

In this instant case, as above admitted by James O. Cull, it had been understood and arranged prior to January 17, 1934, with Robert H. Strong, the promoter of the Chelan Mining Company, that he was to act as a director of the Board of Directors of the Chelan Mining Company in the transactions with the Twisp Company in question in this cause. The record further states that James O. Cull was named on January 26, 1934, in the Articles of Incorporation of the Chelan Mining Company as one of Directors of the Board of Directors (Tr. p. 56), and also was elected as one of its assistant secretaries on January 29, 1934 (St. 86) and Robert H. Strong was elected as the President of Chelan

Mining Company on January 29, 1934 (St. 85) and since it will be later shown herein that there never was any legal special meeting of the Board of Trustees of the Twisp Company held on either the 17th or 30th of January, 1934, there never was any legal consent obtained from the Twisp Company by James O. Cull, which authorized him to represent the Twisp Company in the illegal transaction that James O. Cull acted in as director and assistant secretary for the Chelan Mining Company.

The By-Laws of the Twisp Company, Article II, Section 5, provides:

> "Special meeting of the Board of Trustees shall be held whenever called by the President, or by one third of the Trustees for the time being in office. *The Secretary shall give notice of each special meeting by mail*, the same to be at least two days before the meeting or by telegraph at least one day before the meeting, *to each trustee.*" (Italics ours)

The only officer of the Twisp Company, that had any power or authority to mail notices of a special meeting of the Board of Trustees was the Secretary, who was Mr. Harold Simonds, and

James O. Cull, who was neither the Secretary or Assistant Secretary, as later will appear herein, had no power or authority to mail any notices to the trustees for any special meeting of the Board of Trustees. Notwithstanding that undisputable fact, James O. Cull testified:

> "Q. Will you (Mr. Cull) examine the preamble to the minutes of January 17, 1934, and state whether or not that was a regularly called meeting or whether that was one of the informal meetings that the members held?
>
> A. I wouldn't say there was an informal meeting. *There was notice to the directors that we recognized, except Roy Magney, who was absent and I didn't know where he was. Mr. Simonds' notice was sent to him but so far as a notice as required under the By-Laws to hold a meeting to act upon the questions then considered, it was not a regularly called meeting.*" (St. 26) (Italics ours)

He further testified:

> "At the time the transaction was made with the Chelan and for months before that I had been unable to get in touch with Roy Magney, who was a director, or learn his address, and that was the reason for the meeting of the 17th of January. I was having

correspondence at the time and hoped to get in touch with him in time for that meeting. *I didn't send out formal notices for the January* 17 *meeting. When Mr. Cole called attention to that we sent out notices and called a meeting for the* 30th. *I didn't get in touch with him for some time after that, but I learned his address and I mailed the notice to him at Denver, Colorado, and it never was returned though it had my return address.*" (St. 52)

"HOWEVER" Mr. James O. Cull admits that testimony was not true, because he further testified:

"Q. You (Mr. Cull) had not discussed with John L. Magney or Roy K. Magney any of the details of this deal prior to the time, or up to the time of the meeting of January 17, 1934?

A. No." (St. 79)

"Q. You did say in your cross-examination that John and Roy Magney participated in all the informal meetings and knew all about what was going on, but you want to correct that now to say they didn't know so far as you know, about this particular transaction?

A. I knew in the fall of 1933 they were in Colorado because one of them had mailed me a newspaper with a marked section showing

the transaction of some business there." (St. 79)

"Q Did you personally, or did any of the directors of the company personally in your presence, ever discuss this Strong deal at any time that it was under obligation, with the Magneys?

A. No, but I did, prior to the holding of the meetings in January, try to locate the address of the Magneys. I wrote a friend of mine in Spokane, a Mr. Marshall.

Q. That was not in answer to my question.

A. No, I will confess I don't know they knew anything about it; they didn't discuss it with us; didn't have any opportunity to." (St. 80)

It is clear from the foregoing that James O. Cull testified, as a Director of the Board of Directors and as one of the Assistant Secretaries of the Chelan Mining Company for the sole purpose of attempting to conceal the fact as his testimony shows that he knew all the time after the fall of 1933, where both John L. Magney and Roy K. Magney were located.

Mr. James O. Cull further testified:

"Q. At whose suggestion was that meeting called?

A. Mr. Cole, as attorney, at the suggestion of Mr. Strong, raised the question as to the sufficiency of the notice.

Q. Was that the reason?

A. That was the reason another meeting was called for the 30th, and formal notice issued and sent out." (St. 54)

"Q. Did you have a formal meeting (of the Board of Trustees of the Twisp Company) which required the sending of formal notices between the 15th of August, 1932, and the 30th of January, 1934?

A. No." (St. 27)

Mr. James O. Cull was called as a witness for the Chelan Mining Company and being examined by Charles A. Johnson, of Counsel for the Chelan Mining Company, testified as follows:

"Q. I believe you wrote up the minutes of that (January 17) meeting, did you not?

A. Yes.

Q. And also of the meeting of January 30 which followed?

A. Yes." (St. 183)

"Q. Attached to these minutes and proceedings contained in Exhibit 7 is a notice of the meeting and attached to the notice is a form of the Resolution to be adopted?

A. Yes.

Q. You are familiar with that?

A. Yes.

Q. Did you mail a copy of that notice and resolution to each of those five men whom you have just mentioned as constituting the Board at that time?

A. Yes, I did.

Q. And did you mail this notice to Roy K. Magney at the address which you had ascertained?

A. Yes." (St. 184)

Q. Mr. Cull, for how long were you connected with the plaintiff, Twisp Mining & Smelting Company, either as attorney or as an officer of the company?

A. I was attorney for the company from the time it was organized up to the 5th day of April, 1939, and was acting secretary for a good part of the time, and on January 17, 1934, was appointed by action of the Board as Assistant Secretary.

Q. Have you since your election continued to act as Assistant Secretary of the * * * Twisp Mining & Smelting Company?

A. Yes, up until the meeting of April 5, 1939.

Q. From January, 1934, then until April,

1939, you were the duly elected and acting Assistant Secretary of the Twisp Mining & Smelting Company?

A. Yes." (St. 166)

The Department of this Supreme Court, which rendered the opinion in this case as reported in *Twisp Mining & Smelting Company v. Chelan Mining Company, et al.*, 16 Wash. (2d) 264, 133 P(2d) 300, states the law of this case in regard to special meeting of the Board of Trustees of the Twisp Mining Company, as follows:

"Appellant argues that the overwhelming weight of authority, as stated in Fletcher's Cyc. of Corporations, Vol. 2, p. 162, 393, is that, when the power to do particular acts, or general authority to manage the affairs of a corporation, is vested in a board of trustees, they are vested in the trustees not individually, but as a board, and the trustees can act so as to bind the corporation only when they act as a board and at a legal meeting. Appellant states that the rule and the reasons therefor are well stated in Ames v. Goldfield Merger Mines Co., 227 Fed. 292. We may admit the above rule is a correct statement of the law, but we fail to see where it is applicable here."

And in *Trthewey v. Green River Gorge*, 17 Wash.

(2d) 697, at 727 and 728, 136 P(2d) 1011 and 1012, this Court again said:

> "It is well settled that the power to do particular acts and the general authority to manage the corporate affairs is vested in the trustees or directors, and their acts are binding only when done as a board and at a legal meeting. The law upon the subject is so well stated in 2 Fletcher, Cyclopedia Corporations (Perm. ed.), 392, p. 168 *et seq.*, that we quote therefrom at some length."

And *Bruch v. Nat. Guarantee Credit Corporation* (Del.) 116 Atl. 738, holds:

> "Unless notice be given to each director, as required by the By-Laws of the corporation, the meeting is illegal, and the action taken is not binding."

And John C. Sawbridge on June 15, 1944, swore to an affidavit, which is attached to the "Petition Herein" (page 17), to the following facts, which are not even denied by any of the respondents:

> "Affiant further states that no formal notice was ever sent to him for the special meeting of the Board of Trustees for January 17, 1934, and James O. Cull called affiant by

phone and affiant was present on January 17, 1934, but there was nothing brought before that meeting about John Goetz or Frederick C. MacDonald not qualifying and the purported minutes of that meeting, as inserted in Exhibit No. 7, were never approved by this affiant. Affiant further states he never signed any Notice for the call of a special meeting of the Board of Trustees for the 30th of January, 1934, and never authorized James O. Cull to mail any notices to anyone for said meeting and affiant further states that nothing was brought up at that meeting of January 30, 1934, about John Goetz or Frederick C. MacDonald not qualifying and the purported minutes of that meeting, as inserted in Exhibit No. 7, were never approved by this affiant and the name 'John Sawbridge' that appears on the certified copy of those minutes, on Exhibit No. 10, is not the signature of this affiant."

The purported minutes that James O. Cull drafted, as James O. Cull has already admitted, of date of January 17, 1934, corroborate Mr. Sawbridge's affidavit by showing that the purported meeting was held by the consent in writing by John C. Sawbridge, W. V. Coons, C. M. Hull and Harold Simonds, and James O. Cull admits that no notice was ever given to the fifth trustee, Mr. Roy K. Magney, and that Roy K.

Magney was not present and the purported minutes of that meeting shows on its face that no trustee ever approved of those minutes and those purported minutes that James O. Cull prepared does not show that James O. Cull was appointed as "Assistant Secretary" at that meeting, but on the contrary shows that James O. Cull was merely appointed as "*Secretary Pro Tem*" and as a matter of law then James O. Cull was not appointed as "Assistant Secretary" at that meeting and obviously under such a state of affairs. James O. Cull's testimony as heretofore shown herein that he was appointed as "Assistant Secretary" at the January 17, 1934, meeting was false and untrue.

Article II, Section 5, of the By-Laws of the Twisp Mining & Smelting Company, provides:

> "*Special Meetings.* Special meetings of the Board of Trustees shall be held whenever called by the president, or by one-third of the trustees for the time being in office. *The Secretary shall give notice of each special meeting by mail,* the same to be at least two days before the meeting or by telegraph at least one day before the meeting, *to each trustee;* but, such notice may be waived by

any trustee. At any meeting at which every trustee shall be present, even though without notice, any business may be transacted."

It is certain then, that since only four of the claimed Board of Five Trustees, gave any consent to hold a special meeting of the Board of Trustees for January 17, 1934, and no notice was ever given to Roy K. Magney, the fifth trustee, and Roy K. Magney was not present, there was no legal special meeting of the Board of Trustees of the Twisp Company, held on January 17, 1934, and there being no legal meeting, there was as a matter of law no legal resolution passed at that purported meeting.

John C. Sawbridge is corroborated by James O. Cull, in regard to the undisputable fact, that John C. Sawbridge never signed any notice for the call of a special meeting of the Board of Trustees for January 30, 1934, because James O. Cull prepared the purported minutes of the purported special meeting of the Board of Trustees of the Twisp Company for January and James O Cull testified as follows:

"Q. Attached to these minutes and proceedings contained in Exhibit 7 is a notice

of the meeting and attached to the notice is a form of the Resolution to be adopted?

A. Yes.

Q. You are familiar with that?

A. Yes.

Q. Did you mail a copy of that notice and resolution to each of those five men whom you have just mentioned as constituting the Board at that time?

A. Yes, I did.

Q. And did you mail this notice to Roy K. Magney at the address which you had ascertained?

A. Yes." (St. 184)

Preceding the purported minutes that James O. Cull prepared of the purported special meeting of the Board of Trustees of the Twisp Company of date of January 30, 1934, which were not approved by any of the trustees present, James O. Cull inserted the "Original Purported Notice" of date of January 19, 1934, for the call of a special meeting of the Board of Trustees of the Twisp Company for January 30, 1934, but that Original never was signed by John C. Sawbridge, as President or at all, the purported signature of John C. Sawbridge was merely type-

written, by James O. Cull, or by someone else at the request of James O. Cull, and attached to that purported "Original" is a purported carbon copy of a Resolution authorizing conveyance of the corporate assets, which is not signed by anyone and attached to that is a purported statement of James O. Cull in the form of an affidavit purporting to claim:

> "That, on the 19th day of January, 1934, on behalf of and at the request of John C. Sawbridge, President of said Company, I mailed to each Trustee of said Company, addressed to each of said trustees, respectively, at his last known mail address, as shown by the books and records of the company, a notice of a special meeting of Trustees, to be held on January 30, 1934, * * *."

But James O. Cull did not swear to those statements. And attached to that purported affidavit there is another carbon copy of the purported notice of date of January 19, 1934, which was mailed to Harold Simonds, with Harold Simonds' signature of date of January 20, 1934.

And then the purported minutes of the purported special meeting of the Board of Trustees of the Twisp Company follows, which was pre-

pared by James O. Cull, as a Director of the Board of Directors and Assistant Secretary of the Chelan Mining Company in which James O. Cull falsely states so far as material:

> "A special meeting of the Board of Trustees of Twisp Mining & Smelting Company, a Washington corporation, was held at Room 208 Holtzinger Building in the City of Yakima, Washington, on above date (January 30, 1934) at the hour of 2:00 o'clock P. M. *pursuant to notice duly given by the President,* a copy of which is inserted in the Minute Records preceding the Minutes of this meeting."

And said purported minutes further shows:

> "James O. Cull v[illegible] elected as Secretary pro tem of the meet[illegible] and acted.

And on the last page of those purported minutes the following appears:

> "Thereupon, *the Secretary pro tem* reported that Mr. Harold Simonds, the Secretary of the Company, has been absent from Yakima for some time, and that his absence from Yakima will continue for a considerable time in the future; and the question was submitted and considered as to whether an Assistant Secretary should be appointed wi[illegible] authority to act in all ways as Secretary

of the Company during the absence of Mr. Simonds. (Italics ours)

"Thereupon, upon motion duly made, seconded and carried by unanimous vote of all Trustees of the Company, the following Resolution was adopted:

"Whereas, Harold Simonds, Secretary of this Company, has been absent from Yakima, Washington, the place of busines of the Company, for several months; and it is anticipated that said Secretary will continue to be absent for some time; and

"Whereas, for the purpose of executing the instruments referred to in the Resolution just adopted by the Board, and for other purposes incident to the business of the Company, it is desirable that someone at Yakima, Washington, be empowered to act as Assistant Secretary and to execute any and all instruments or papers on behalf of the Company, and to keep the minutes and records of the Company;

"NOW THEREFORE, BE IT RESOLVED, that James O. Cull, of Yakima, Washington, who has heretofore acted, and is now acting, as attorney for the Twisp Mining & Smelting Company, shall be and is hereby appointed as Assistant Secretary of said Company, with full power and authority to act in all matters pertaining to the Company business, and in keeping its records and executing instruments of conveyance or legal papers of

any kind, the same as a Secretary of the Company might or could do if personally present; all until further order or direction of the Board of Trustees evidenced by entry thereof in the Minute Records of the Company;

"BE IT FURTHER RESOLVED, that specific power and authority are hereby granted to James O. Cull, as Assistant Secretary of the Company, to execute any and all instruments required by the Resolution for transfer of corporate property heretofore adopted at this meeting; and to affix thereto the corporate seal.

"There being no further business to come before the meeting it was, upon motion duly made, seconded and carried, adjourned.

Attest: James O. Cull .....
Secretary Pro Tem." President.

The final proof of the undisputable fact that the purported special meeting of the Board of Trustees of the Twisp Company of January 30, 1934, was not a legal special meeting is found in a letter which James O. Cull, acting in his capacity of a Director on the Board of Directors and one of the Assistant Secretaries of the Chelan Mining Company and with absolutely no lawful power or authority to legally mail any notice of the holding of a special meeting of the Board

of Trustees of the Twisp Company and in the absence of any signed notice by John C. Sawbridge, as President of the Twisp Company, which James O. Cull falsely swore existed, as heretofore shown herein, mailed to Roy K. Magney of date of January 24, 1934; which Petitioner was unable to discover until June 5, 1944, which disclosed that James O. Cull never mailed any written notice of the call of the purported special meeting of the Board of Trustees of the Twisp Company to Roy K. Magney, one of the five Trustees of the Board of five Trustees of the Twisp Company, which James O. Cull claimed existed during the month of January, 1934.

This letter, a true copy of which is set forth on pages 6 and 7 of the Petition herein, disclosed the following facts:

> "January 24, 1934.
>
> Mr. Roy K. Magney, 725 United States National Bank Building, Denver, Colo.
>
> My Dear Roy: Greetings. How are you and where have you been all of the time that I haven't heard from you? After our friend Goetz "blew up," and our friend Hottel got interested in mines over at Montana, I despaired of our ever doing anything with the

Twisp; but, fortunately, I think we contacted a live wire in the person of a Mr. Strong, of Portland, who, I believe, is capable of financing the developments of the property, if it shows up properly under rigid examination. Mr. Strong recently made us a proposition, that he would organize a new company to take over the rights (?) which we hold and give the Twisp Mining & Smelting Company a 10% share in all of the capital stock of the new company. If he makes it good, it will be worth something, and if he does not, it will be worth less than at present; so we, here in Yakima, *told him we were ready to go on the proposition. We held an informal meeting here on the* 17th *and adopted a resolution in form as per copy herewith. I told Mr. Strong, who was here at the time, that we would call and hold a regular meeting of the Trustees, informing him that there are only five active Trustees at the present time, to-wit, you and Sawbridge and Coons and Hull and Simonds;* there being two vacancies on the Board which resulted in 1932 when Hottel and Julian resigned and we elected Goetz and his friend, MacDonald, of Seattle. Neither of them ever qualified by taking the oath of office, although I wrote each of them two or three times about it. I wish you might be present at this meeting, but, probably, because of distance, and the intangible value of our 'mines' you will not feel justified in tearing away from your business there and making the trip. In any

event, drop me a line; and, if you are willing to join with us in the venture, kindly sign the approval form below the copy of Resolution, if you cannot attend the meeting; and send it in to me, so that I may file it with the other papers. * * *. Sincerely yours,

(Signed) James O. Cull."

(Italics ours)

This Court in *Trethewey v. Green River Gorge*, 17 Wash. (2d) 697, at 727 and 728, 136 P(2d) 1011 and 1012, hold the law of this state is so well stated in 2 Fletcher, Cyclopedia Corporations (Perm. ed.), Sec. 392, p. *et seq.*, that we quote therefrom at some length, and quotes the following part of the law applicable to this instant case to be:

> "It is fundamental that officers of boards can only act as such constituted boards when assembled as such and by deliberate and concerted action dispose of the issue under consideration, and they cannot act in an individual capacity outside of a formal meeting, and a majority of the individuals expression be the action of the board."

Under James O. Cull's own admission in the above written letter that is signed by him and which cannot be disputed, he positively admits

that there was no regularly called special meeting of the Board of Trustees of the Twisp Company held on January 17, 1934, he further admits that it was not a "Formal Meeting," but admits that it was an "Informal Meeting" at which under the law as stated above, which this Court holds is the law governing such a state of affairs, "*that*" no legal resolution of any kind could have been passed at that "Informal Meeting" and of necessity then, the purported resolution that Mr. James O. Cull claims was passed was absolutely null and void from its inception.

Likewise, since John C. Sawbridge maintains under oath in his affidavit attached to the Petition herein, that he never signed any written notice for a call of a special meeting of the Board of Trustees of the Twisp Mining & Smelting Company for January 30, 1934, which affidavit is not even denied by any of the Respondents, it was an absolute impossibility for James O. Cull to mail a "True Copy" of an instrument that never in fact or in law existed to either Roy K. Magney or Harold Simonds and this letter of James O. Cull to Roy K. Magney does not notify Roy K. Magney, when the purported special

meeting of the Board of Trustees of the Twisp Company was to be held and neither Roy K. Magney nor Harold Simonds were present and as a matter of law the purported special meeting of January 30, 1934, was not a regularly called special meeting, but was in fact and in law an absolute "Informal Meeting," at which no legal resolution of any kind could have been legally passed and as a matter of law James O. Cull's testimony that he was legally appointed as the "Assistant Secretary" of the Twisp Mining & Smelting Company is not true, but is absolutely false and untrue.

Further, the purported minutes that James O. Cull, acting in his capacity of one of the Directors of the Board of Directors and one of the Assistant Secretaries of the Chelan Mining Company prepared, shows on its face that no "Trustee Present" signed or approved same and John C. Sawbridge swears in his affidavit herein that he did not approve the purported minutes and the instrument shows that there is no signature of the President placed on the original and the place where the President should sign is blank. But James O. Cull, knowing those facts, prepared

a certified copy of his purported minutes of date of January 30, 1934, and stated in his certificate as follows:

> "State of Washington )
> County of Yakima ) ss.
> THIS CERTIFIES, that the attached and foregoing is a full, true and correct copy of the minutes of a special meeting of the Board of Trustees of Twisp Mining & Smelting Company, a Washington corporation, duly and legally held pursuant to notice given as required in the by-laws, on the 30th day of January, 1934, at the office of the company, in the city of Yakima, Yakima County, Washington, which said meeting was attended and participated in by three Trustees of the corporation, to-wit, being the majority in number of all trustees of the corporation; all as appears from the original files and records of said corporation now in my possession. Dated this February 1, 1934. (Signed) James O. Cull, Assistant Secretary of Twisp Mining and Smelting Company."

And Mr. Johnson, of Counsel of the Chelan Mining Company, examined James O. Cull on the trial in Okanogan County, State of Washington, as follows:

> "Q. I would like to identify an exhibit. Will you (Mr. Cull) look at this exhibit,

Chelan Mining Company's Exhibit No. 10, for identification. Look at it and state whether or not that is your signature. That purports to be a certified copy of the special meeting of the Board of Trustees of the Twisp Mining & Smelting Company held January 30, 1934?

A. Yes that includes the minutes.

Q. Were you at that time assistant secretary of the Twisp Mining & Smelting Company?

A. *Yes, I had been so designated on the* 17th.

Q. I will ask you if Exhibit No. 10 is a certified copy of the minutes of that meeting which you sent to Mr. James Cole, attorney at Portland, at his request?

A. Yes.

Q. That was sent about the same time the deed for that property was sent in?

A. Yes, that undoubtedly was transmitted with the deed.

Mr. Edelstein: Mr. Sawbridge purports to have signed the minutes. John Sawbridge, president, never signed the minutes.

Mr. Cull: I see Mr. Sawbridge's signature is not on the original." (St. 73-74)

And that "Forged" purported minutes that James O. Cull prepared and admits that it was not signed by John Sawbridge, who in fact died September 9, 1931, and which John C. Sawbridge swears in his affidavit attached to the Petition herein is not his signature was uttered by the Chelan Mining Company in the presence of its counsel, Mr. Johnson; and its President, Robert H. Strong; and two of the Directors of its Board of Directors, Mr. Cull and James Cole, who was also one of its counsel and introduced in evidence and admitted in evidence over objections of counsel for the Twisp Mining Company (St. 73 and 74).

It is the law of this land as expressed by the Supreme Court of the United States in *Mooney, Petitioner, v. Holohan, Warden of San Quentin Penitentiary, Respondent*, 294 U. S. 103, 112, 79 L. Ed. 791, 794, in a case where the Attorney General contended, as follows:

> "The Attorney General contends that 'it is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence as he has, that it can be said

that due process of law is denied.' Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirements of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodied the fundamental conception of justice which lie at the base of our civil and political institutions. Hebert v. Louisiana, 273 U. S. 312, 316, 317, 71 L. ed. 270, 273, 47 S. Ct. 103, 48 A. L. R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through the deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. *And the action of prosecuting officers on behalf of the State, like that of administrative officers in the exercise of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive*

*or administrative officers.*" (Citing cases) (Italics ours)

"Reasoning from the premises that the petitioner has failed to show a denial of due process in the circumstances set forth in his petition, *the Attorney General urges that the State was not required to afford any corrective judicial process to remedy the alleged wrong. The argument falls with the premises.*" (Citing cases) (Italics ours)

Likewise in *Jones v. Commonwealth of Kentucky*, 97 Fed. (2d) (6th C. C. A.) 335, 338, holds:

"The concept of due process as it becomes crystallized in the public mind and by judicial pronouncement, is formulated in Mooney v. Holohan, 294 U. S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406. Its requirements in safeguarding the liberty of the citizen against deprivation through the action of the state embodies those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' referred to in Hebert V. Louisiana, 272 U. S. 312, 316, 317, 47 S. Ct. 103, 71 L. Ed. 270. 48 A. L. R. 1102. This requirement cannot be satisfied 'by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court

and jury by presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtainng of a like result by intimidation.' If it be urged that the concept thus formulated but condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured, then the answer must be that the delineated requirement of due process in the Mooney case requires no more than the facts of that case require, *and that 'fundamental conception of justice which lies at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired.* * * * Considerations of delicacy and propriety need no longer deter amelioration. The appellant is not to be sacrificed upon the altar of a formal legalism too leniently applied when those who from the beginning sought his life in effect confess error, when impairment of constitutional rights may be perceived, and the door to clemency is closed." *Conviction was reversed.* (Italics ours)

This Court in *White v. Donini*, 173 Wash. 34, 21 P(2d) 265, held in a similar case:

> "Two questions are presented by the petition: (1) Has this Court jurisdiction to grant the Trial Court permission to hear the two motions presented by the Petition? and (2) If this Court has jurisdiction, is this a proper case for its exercise? That the Court has such power is beyond question; under our decisions. Haaga v. Saginaw Logging Co., 170 Wash. 93, 15 P(2d) 655; State ex rel. Cross v. Superior Ct., 158 Wash. 46, 51, 290 Pac. 430; In re Shilshole Avenue, 101 Wash. 135, 1481, 172 Pac. 338. The present writer did not subscribe to the prevailing opinion in the recent Haaga case, but expressed his dissent therefrom. The dissent was based upon the grounds that the evidence therein, on which a new trial was sought, was not, 'newly discovered,' but 'newly created.' That is, that it was evidence of a condition that had arisen long after trial and judgment, and further, that it was not shown that any fraud had been practiced in securing the verdicts. The case at bar not only falls within the rule in the Haaga case, but also escapes the disapproval voice in the dissent. The evidence here sought to be introduced is not only newly discovered, but raises a question of false testimony."

There can be no distinction made in regards to the requirements in safeguarding the liberty of the citizen against deprivation through the action of the state, under the provisions of the Fourteenth Amendment to the Constitution of the United States, from the requirements of the Fourteenth Amendment in safeguarding the property of the citizen against deprivation though the action of persons by the knowing use of perjured testimony to illegally obtain the property of another without due process of law as was manifestly done in this instant case.

In *McClutchy v. Superior Court* (Cal.) 51 Pac. 696, the court in a case where the court refused to hear McClutchy held:

> "It is contended by respondent that, even if the action of the court was wrong, it was error merely, which cannot be reviewed on certiorari; that the court having jurisdiction of the person and subject-matter, the method in which it exercised such jurisdiction cannot be inquired into in this proceedings, which looks only to the question of the jurisdiction. If the premises were correct, the conclusions would undoubtedly follow. But with the view that the action involved no more than mere error we cannot coincide. It was a trangression of the fundamental right

guaranteed to every citizen charged with an offense, or whose property is sought to be taken, of being heard before he is condemned to suffer injury."

**NOTWITHSTANDING THE UNDISPUTABLE FACTS, AS HERETOFORE CLEARLY SHOWN HEREIN THAT THE PURPORTED SPECIAL MEETINGS OF THE BOARD OF TRUSTEES OF THE TWISP COMPANY OF DATE OF JANUARY 17 AND 30, 1934, WERE NOT REGULARLY CALLED AND WERE NOT LEGALLY HELD, THE "DEPARTMENT" IN IT OPINION AT PAGE 289, ASSUMED WITHOUT EVIDENCE TO SUPPORT THOSE ASSUMPTIONS, AS FOLLOWS:**

1. "The meeting of January 17 and 30, 1934, were regularly called special meetings * * *."

2. The Department further assumed in regard to the purported special meeting of the Board of Trustees of date of January 17, 1934, that, "The directors met as a board, and a quorum of the directors then in office being present, proceeded as a board to transact the business of the corporation, referred to in the notice given of such meeting." (St. 289-290) In face of the fact as the evidence shows, as heretofore quoted herein, that James O. Cull, a director of the Board of Directors and one of the Assistant Secretaries of the Chelan Mining Company, admits that he *"Didn't send out*

*formal notices for the January 17 meeting.*"
(St. 52)

And James O. Cull further admits in writing in the letter he wrote to Roy K. Magney of date of January 24, 1934, heretofore quoted on pages 13 and 14, herein:

> "We held an informal meeting on the 17th and adopted a resolution in form as per copy herewith."

The Department further contends (Opinion pp. 278, 279):

> "Mr. Strong was present at this meeting, with his attorney, Mr. Cole. Mr. Strong submitted his proposition to the board, and after discussion a resolution was passed, accepting Mr. Strong's offer."

When the Department on page 289 of its Opinion under the authority there cited, no legal resolution could be passed at an "Informal Meeting" as a matter of law.

3. The Department further contends (Opinion pp. 279, 280):

> "A notice of the meeting of January 30, 1934, signed by John C. Sawbridge, as presi-

> dent, dated January 19, 1934, to which was attached a copy of the resolution passed at the January 17 meeting, was mailed to each of the five directors, at his last known address, on January 19, 1934, as appears from the affidavit of James O. Cull."

When no such affidavit exists in this record and John C. Sawbridge's affidavit (Petition pp. 16, 17 and 18), shows that he never signed any notice for the call of the special meeting of date of January 30, 1934, and no such notice signed by John C. Sawbridge appears in this record at any place and no such notice was mailed to Roy K. Magney.

4. The Department further contends (Opinion p. 281):

> "It was pursuant to this resolution that Mr. John Sawbridge (meaning John C. Sawbridge), as president, and Mr. James Cull, as assistant secretary, executed and delivered to Mr. Strong the deed of January 31, 1934, here in question." (Meaning the purported resolution claimed to have been passed at the January 17, 1934, informal meeting).

Which void resolution gave neither John C. Sawbridge nor James O. Cull any power or legal

authority to execute that deed as officers of the Twisp Mining & Smelting Company.

5. The Department further contended (Opinion p. 281):

> "Mr. Strong formed the Chelan Mining Company, pursuant to his agreement with Twisp; and, after the conveyance by Mr. Strong and wife to Chelan Mining Company, that company issued to Twisp 250,000 shares of its stock, which was delivered to Mr. Cull and *receipted for by him. Twisp still holds this stock.*" (Italics ours)

However, the record shows that "James O. Cull" was one of the Assistant Secretaries of the Chelan Mining Company when he received that certificate for 250,000 shares of stock of the Chelan Mining Company and that he never was the "Assistant Secretary of the Twisp Company" as already shown heretobefore herein, and James O. Cull testified as follows:

> "Q. Did you ever inform either of the Magneys of the receipt of the shares of stock in the Chelan Mining Company? Did you inform the Magneys that you had that certificate?
>
> A. I couldn't say specifically they knew that I had it." (St. 51, 52)

"Q. Mr. Cull, sometime in May, 1939, I think you testified, or in April, I am not sure of the date, you turned over to Mr. Blaesser the minutes (Exhibit No. 7) introduced in evidence?" (St. 55)

"A. Yes, April 5, 1939, I had with me these minutes and took them to the meeting. I have forgotten whether I left them with Mr. Blaesser at that time or whether he called at the office later and picked them up. He became the succeeding secretary. I turned these (minutes) over to him and I told him and one of the Magneys at the meeting that I had the 250,000 shares of stock and Mr. Blaesser informed me at the time he didn't know whether they wanted to take it at the time and they would inform me later on, so I continued to hold the stock, and later on I got the information or idea that they didn't want to accept it so I just continued to hold the stock.

Mr. Johnson: Q. That Certificate of Stock that we are talking about is 250,000 shares of stock in the Chelan Mining Company?

A. Yes.

Q. That was the consideration which is mentioned in the Resolution for the deed?

A. For the transfer of the property rights from the Twisp Mining & Smelting Company to the Chelan Mining Co." (St. 55, 56)

6. The Department contends (Opinion p. 293):

> "Some contention is made that Mr. Sawbridge was not president of Twisp at the time the deed of January 31 was executed, but that Mr. Goetz was president. We have heretofore held that Mr. Goetz never became a trustee of Twisp, and therefore never became president. Mr. Sawbridge, who had been president prior to August 15, 1932, continued to act as president, without objection, and was at least a de facto officer, if not a de jure officer."

However, John C. Sawbridge, in his affidavit attached to the Petition herein on pages 16 and 17, swears under oath and same is not denied, as follows:

> "That he is the person who presided over the special meeting of the Board of Trustees held on August 15, 1932, and that at that meeting affiant resigned as 'President' of the Twisp Mining & Smelting Company and Goetz was elected as 'President' in affiant's place and affiant understood at that meeting that he no longer was the 'President'."

The law as stated by this Court in *Matson v. Johnson*, 174 Wash. 12, 24 P(2d) 592, is:

> "It is firmly established that the acts of a de facto officer will bind the corporation and

all business relations with it; and conceding the theory of the plaintiff that the corporation in this instant case could act only through a majority of the board, and that a majority of the board only acted in the election or appointment of the subsequent trustees, we think the subsequent action of the trustees were valid for the reason that the trustees elected were de facto trustees, and, that being so, it is not necessary to discuss the question as to whether they were de jure trustees." Citing Baggot v. Turney, 21 Wash. 339, as authority, where this court held: "Such officers (that is de facto officers) are distinguished from mere usurpers, and in State v. Curtis, 9 Nev. 325, the court held: 'In order to make a person an officer de facto, he should in some way have been put in office, and have secured such a holding thereof to be in peaceful possession of an office. In the case at bar there was no forcible entry into the office by these elected trustees. They secured peaceful possession of the office by color of right; that is, by the action of all the available trustees of the corporation. It does not seem that it was forcibly or clandestinely done, and no objection was made to their entry into office by any one interested or disinterested and it seems to us they can be plainly distinguished from mere usurpers, whose action would not be binding upon the corporation or any one else.'"

In this instant case, according to the affidavit of K. H. Blaesser, Secretary of the Twisp Company, attached to the Petition herein on pages 20 to 40, James O. Cull turned over to Mr. Blaesser on April 5, 1939, the records of the Twisp Company that were contained in Exhibit No. 7, and advised Mr. Blaesser that constitutes all the records in his possession and that there was no correspondence or documentary evidence in his possession. However, on March 21, 1944, a stockholder of the Twisp Company visited James O. Cull in his office at Yakima, Washington, for the purpose of obtaining the address of Frederick C. MacDonald and while there discovered that James O. Cull had concealed important correspondence and other documentary evidence and James O. Cull agreed to find said concealed matter and forward same to K. H. Blaesser and on April 28, 1944, that concealed matter was received by K. H. Blaesser by express and true copies of that portion of said concealed matter is set forth in K. H. Blaesser's affidavit and on April 28, 1944, is the first time that the Twisp Company had knowledge such evidence existed and on

pages 24 to 40 of that affidavit it is disclosed that John Goetz, was duly elected as the "President" of the Twisp Company on August 15, 1932, and that he was duly ordered by the Board of Trustees to transact the business then under consideration of the Twisp Company and that John Goetz did transact that business and did duly qualify at least as a "De Facto President," if not a "De Jure President" and further established that James O. Cull's testimony to the contrary was false and untrue and John C. Sawbridge never was reelected as the President of the Twisp Company after August 15. 1932, and there was no legal meeting of the Twisp Company or its Board of Trustees held after August 15, 1932. for the reason, as heretofore shown herein, the purported special meetings of the Board of Trustees of January 17 and 30, 1934, were only "Informal Meetings" where no one present could legally act as an officer of the Twisp Company and John C. Sawbridge had no legal authority to do any official act in the premises by virtue of the void purported meetings of January 17 and 30, 1934.

7. Section 3803-31, paragraph 1 of Reming-

ton's Revised Statutes (Supp.) of the Uniform Business Corporation Act of 1933, provides:

> "* * * A director shall hold office for the term for which he was named or elected and until his successor is elected and qualified."

And Article II, Section 1 of the By-Laws of the Twisp Company in regards to the term of office of Trustees, provides:

> "and trustees shall hold office for one year and until their successors are elected and qualified."

And the Department in this instant case denied the Twisp Company equal protection of law in holding that since John B. Hottel and Charles W. Julian resigned as Trustees on August 15, 1932, and John Goetz and Frederick C. MacDonald were elected in their place as Trustees, and since James O. Cull, one of the Assistant Secretaries of the Chelan Mining Company claimed neither Mr. Goetz nor Mr. MacDonald never qualified that there were two vacancies on the Board of Seven Trustees of the Twisp Company during the month of January, 1934, for the obvious reason that in law John B. Hottel and

Charles W. Julian remained as trustees until their successors were duly elected and duly qualified as a matter of stautory law, which the Department had no power or authority to hold otherwise and therefore as a matter of law there were no vacancies on the Board of Seven Trustees of the Twisp Company during the month of January, 1934.

8. Section 3803-36 of Remington's Revised Statutes (Supp.) of the Uniform Business Corporation Act of 1933, provides:

> "1. A voluntary sale, lease or exchange of all the assets of a corporation may be authorized by it upon such terms and conditions as it deems expedient, including an exchange for shares in another corporation, domestic or foreign. 2. * * * If the corporation be unable to meet its liabilities then matured, such authorization may be given by the vote of the board of directors."

In *Enright, as Trustee in Bankruptcy, v. Heckscher,* 240 Fed. (2d) (C. C. A.) 963 at 865 and 872, passed on a similar statutory situation and held:

> "The object of the Syndicate, a corporation, was to purchase, acquire, or lease mines or mineral lands of every kind. Law pro-

vided when a stockholder received stock from a corporation as fully paid, for which he gave less than par, he is liable for interest, as damages for the retention of the money, on the balance of the par value of the stock from the time payment for the stock is due. Trial court held in substance that the whole spirit and policy of the act was so clearly opposed to any arrangement by which corporation stock shall issue without receipt by the company of an equivalent in value to its par that any arrangement to this effect must be void, as contrary to public policy of the law. Volney v. Dixon (N. J. Eq.) 60 Atl. 189, and further held: It seems from the minutes that there were five directors present, but Mr. Munford was interested in the transaction, and left the room or retired while the directors were considering this proposition, and was not present when it was acted upon. Of course, it would constitute a quorum if he was there, even though he did not vote; but if he left the room, so as to leave only four directors present, and nine were required, *it seems clear there would have been no meeting at the time the action was taken, therefore there would be no finding by the directors, as required by section 49 of the corporation Act or law, that the value of the property transferred was equal to the value of the stock issued. The resolution was a nullity.*" (Italics ours)

In this instant case, as already shown herein, there was no formal notice of the call of the purported special meeting of the Board of Trustees of the Twisp Company for the purported special meeting of the Board of Trustees for the holding of such a meeting on either January 17 or January 30, 1934, ever issued by one who had any legal authority to issue a formal notice for the holding of a special meeting and there never were any formal notice mailed to Roy K. Magney, one of the trustees of the so-called Board of Five Trustees or to John B. Hottel or Charles W. Julian, who still held the office of a trustee until their successors were duly elected and qualified and of necessity then there were no special meetings of the Board of Trustees of the Twisp Company held on either January 17, 1934, or January 30, 1934, as a matter of law and the purported resolutions that appear in the purported minutes of those purported meetings that were prepared by James O. Cull as Secretary Pro Tem of the Twisp Company and as one of the Assistant Secretaries of the Chelan Mining Company, which were never approved by any of the trustees present were absolutely null and void from their in-

ception and there never was any legal finding of the fact that there were obligations of the Twisp Mining & Smelting Company, which the corporation or its stockholders were unable to meet then matured and under the above case there never was any legal power or authority vested in the three trustees present at either of the purported meetings to dispose of all of the assets of the Twisp Mining & &Smelting Company and the Chelan Mining Company having acted in said pretended transaction by its authorized "Assistat Secretary" James O. Cull, was charged with the knowledge of James O. Cull as a matter of law.

9. The Department further contends (Opinion 271 and 272):

> "In regard to the Executory Sale Contract of date of November 23, 1927, wherein the Alder Group Mining & Smelting Company, sold the three Patented Mining Claims to John L. Magney, which contract was duly assigned to the Twisp Mining & Smelting Company, by messne assignments which were duly filed for record on June 27, 1932, with the Auditor of Okanogan County, State of Washington, that Mr. Morrill testified as follows:

"'Mr. Morrill testified that on January 19, 1932, a notice of forfeiture was served on John L. Magney, the Alder Development Company, to which Mr. Magney had assigned his contract with the Alder Group, and also on the Alder Metals Corporation, a holding company for Alder Development Company. On August 24, 1932, Mr. Morrill brought an action in Spokane County, to cancel the Magney contract. * * * Mr. Morrill stated that, at the time he started the above action, there was nothing of record showing that Twisp has or claimed any interest in the property.'"

And Mr. Morrill, being examined by counsel for the Methow Gold Corporation, identified Exhibit No. 44, as a certified copy of the court records of the purported action in Spokane County, State of Washington, that Mr. Morrill claimed cancelled the Executory Sale Contract of date of November 23, 1927, and the Court admitted Exhibit No. 44, in evidence (St. 256).

Mr. Gillespie: "Q. At the time you (Mr. Morrill) commenced this action, did you ever hear or know that the Twisp Mining & Smelting had any interest or claimed to have any interest, or that the contract had been assigned?

A. I may have heard about the Twisp. I

wouldn't be sure, but I know very well there was no record of anything of the Twisp or anything to show that they held it." (St. 257)

And Exhibit No. 44 shows that the action was brought by the Alder Group Mining & Smelting Company as "Plaintiffs" and that the "Plaintiff" did not allege that it had paid its license fee last due the State of Washington and under the law as stated by this court in *National Grocery Co. v. Fur Trading Co.*, 3 Wash. (2d) 288, 100 P(2d) 408, is:

> "That under the provisions of section 2842 of Rem. Rev. Statutes of 1932, no corporation shall be permitted to commence or maintain any suit or proceedings in any court of this State, without alleging and proving it had paid its last license fees last due."

It is plain, therefore, that there was no plaintiff in the above purported action and the Twisp Company was not made a party and under the authority of *Patterson v. Ford* 167 Wash. 121, 8 P(2d) 1006, no judgment could have been rendered against the Twisp Company and it now appears in the "Petition" herein that Mr. Morrill

has notice of the assignment to the Twisp Company, as early as January 10, 1931, and was actively engaged in negotiations with John Sawbridge, the President of the Twisp Company pertaining to the operation of the property under the assignment of the Executory Sale Contract, and it is manifest that Mr. Morrill's testimony to the contrary was false and untrue.

As held in *Jones v. Commonwealth of Kentucky*, 97 Fed. (2d) (6th C. C. A.) 335, 338, *supra*:

> "The 'fundamental conception of justice which lies at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty convictions upon perjured testimony if later, but fortunately not too late, its falseness is discovered, if constitutional rights are not to be impaired, and that rule applied equally to purported judgments in civil cases that are procured by the knowing use of perjured testimony, as heretofore shown was done in this instant case."

10. The Department further contends (Opinion p. 270):

> "It may be stated that this case was not presented to this court by the same counsel

who tried the case for appellant * * *. We make this statement for the reason that counsel for appellant in this court makes some claim that the deed executed on behalf of appellant on January 31, 1934, was a forgery. No such claim or contention was made or presented to the trial court; in fact, no contention was made in the lawer court that the then directors of appellant, or Mr. Strong, or the Chelan Mining Company, acted other than in good faith. * * * We therefore cannot consider the claim now made in this court that he deed was a forgery."

The Department manifestly based the above statement on the false Statement of the Receiver's Counsel, coupled with the false statement of the Methow Gold Corporation's Counsel, which are set forth on page 12 of the Petition herein and the Department in making its statement failed to observe the Memorandum of the Trial Court in regard to the theory of the Twisp Company's case in the lower court, which is set forth on page 12 of the Petition, which as stated by the Trial Judge was as follows:

"It is plain from the allegations of the plaintiff's complaint * * * that the plaintiff is seeking to stand squarely on the proposition that the actions of the trustees of the

plaintiff in January, 1934, were wholly without authority and did not bind the plaintiff corporation, and that the illegal character of the performance was known to the officers and agents and managing officers of the Chelan Mining Company—in fact the plaintiff alleges that the agents and managing officers of the Chelan Mining Company participated in, and were accessories in those unlawful and illegal proceedings carried on in January, 1934, when ostensibly the properties of the plaintiff were conveyed to the defendant Chelan Mining Company. * * * This being the situation I must look upon the complaint as being a single purpose effect to set up the invalidity in the conveyance on the sole grounds that it was consummated without authority and was not binding on the Twisp Mining & Smelting Company, the plaintiff herein, and that all the allegations in the complaint to the effect that the officers and agents of the Chelan Mining Company aided, abetted, cajoled and induced the officers and agents of the plaintiff in the illegal perpetrations, are to be taken and considered merely for the purpose of showing that the Chelan Mining Company had notice all along of the invalidity and unholy character of the color of title which it acquired." (St. 341, 342)

It is further alleged in the Petition herein, that the question of the "Forged Deed" was raised in

a brief to the Trial Court, which was served on each of the Respondents and each of their counsels accepted service of said brief and it was argued to the Trial Court by Tracy E. Griffin, one of the original counsel for the Twisp Company in this litigation and those allegations are not even denied by any of the appellees in this proceedings. (See Petition pp. 19 and 20)

It has been positively shown herein, that there was no legal special meeting of the Board of Trustees of the Twisp Company held on either January 17, 1934, or January 30, 1934, and being no legal special meeting held on those dates there never was any legal resolution passed at either purported meeting and of necessity then as a matter of law there never was any legal authority given to either John C. Sawbridge of James O. Cull, to execute any deed of transfer of the Twisp Company's assets, in the name on the Twisp Mining & Smelting Company on January 31, 1934.

In *Hotaling v. Hotaling* (Cal.) 224 Pac. 435, that question was squarely passed upon and the court held:

"The deed under which Richard M. Hotaling claims as an attempted corporate act, it must, we think, be conceded to have been invalid from its inception for the reason that its execution was never effectively authorized by the Board of Directors of the corporation in whom was vested the sole power to give such authorization."

Neither a bona fide President nor a bona fide Secretary has any legal authority to execute any instrument of transfer of all the assets of a corporation unless specific power and authority is given them by the stockholders or the Board of Trustees to do so and since no such authority was ever given either John C. Sawbridge or James O. Cull, who were neither the President or Assistant Secretary of Twisp Company, their acts in so attempting to transfer all the assets of the Twisp Company to the Chelan Mining Company constitutes an absolute forgery under the provisions of Section 2586 of Rem. Rev. Statutes and the Department that refused to hear or consider that phase of this cause not only committed error, but its action was not merely error but was a denial of the Twisp Company's Constitutional rights to be protected from the confisca-

tion of its real property and real property rights without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States and the United States Supreme Court in *Chambers v. Florida,* 309 U. S. 227, 241, 84 L. Ed. 716, 724, holds:

> "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our constitution."

And that rule applied with equal force to this instant case, because the Fourteenth Amendment not only protects one from being convicted of a purported crime without due process of law, but equally protects the stockholders of a corporation from being deprived of their interests in real property and real property rights without due process of law.

And in *Jones v. Commonwealth of Kentucky,* 97 Fed. (2d) (6th C. C. A.) 335, *supra,* under the

authority of the *Mooney v. Holohan* case, holds that the state is required to afford a corrective judicial process to remedy the alleged wrong and the State has furnished a remedy in providing that the injured party may apply to this Court for permission to present a Motion for a new trial to the lower court or a Motion to re-open the case for additional evidence and it is the duty of this Court to grant such permission upon the showing herein set forth and thereby protect the stockholders of the Twisp Mining & Smelting Company from being deprived of their interest in real property and real property rights without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

And to that end this Petition for rehearing should be granted and this matter be heard before the entire court En Banc before the stockholders of the Twisp Mining & Smelting Company are deprived of their interest in real property and real property rights by the knowing use or perjured testimony that was used in this cause

to obtain the judgment of the lower court and the affirmance of same by this Court.

Respectfully submitted,

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*Attorney for Petitioner.*